for The Defense

Volume 7, Issue 2 ~ ~ FEBRUARY 1997

The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

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YOGURT = AGGRAVATION

Improper Sentencing Factors

By Russ Born
Training Director

Hold it! Don't rush out to call the Arizona Vegetable Police. The last time I checked, the legislature had not declared yogurt a protected food group. Come to think of it though, when yogurt goes bad, its odor does remind me of a certain green vegetable...Wait! I digress too much. The issue here is whether or not possession of yogurt could be treated as an aggravating factor in Arizona. That statement may sound truly absurd, yet in Arizona, it may not be far from the truth. Let me give you an example based upon an incident reported by the Arizona Republic on November 4, 1996.

On November 2, 1996, Fadel Salem and Mohammed Khalid, who lived in Chicago, were driving through Kentucky. Their car was stopped by the police. Inside their vehicle were car stereos, cameras, pieces of electronic equipment and a large quantity of suspicious white powder. A trained narcotics dog "hit" several times on packages containing "fist-sized chunks" of a powdery substance. Both men were arrested, held for two days and charged with trafficking in cocaine. Although both men insisted that the "cocaine" was dried yogurt, they were not freed until a lab report confirmed it was not a controlled substance but in fact yogurt. The electronic equipment belonged to one of the men who was a legitimate electronics dealer.

Imagine, if you will, that having had his fill of Kentucky hospitality, one of these gentlemen came to Arizona where he unfortunately ran into some legal trouble. Now he is our client and is awaiting sentencing on a felony charge where the plea calls for no agreements as to the sentence. How might the perfectly innocent behavior involving the yogurt, play out in Arizona?

First of all, think about the confidential criminal history in the back of the presentence report. As a defense attorney, I can't begin to count the number of times *mere arrests* have appeared in that section. If our client is now facing sentencing on a drug possession charge, you can bet that the Kentucky arrest for trafficking in cocaine takes on considerable significance. This is especially true if the client tells the judge or presentence writer that he just started using illegal substances and has never tried to use or sell drugs before. Perhaps our client tells the presentence writer that up until now he has never been in trouble with the law!

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The client, of course, would be telling the truth. However, due to the unfortunate incident with the yogurt, it would not appear truthful to the judge or the presentence writer. In fact, if the presentence writer was able to get a copy of the initial police report but not the follow-up lab analysis (which is very likely), the crime would appear somewhat serious. According to the reports, there were chunks of cocaine on which a *trained narcotics dog "hit."* Even though our client denies drugs were involved, the presentence report may read like this:

> "Defendant claims that his arrest for trafficking in narcotics was dismissed because the substance was yogurt. Although this presentence writer was unable to verify the reason for dismissal, the police reports show that a trained narcotics dog "hit" on a powdery substance in defendant's car which the police believed to be cocaine or a cocaine base."

So much for the yogurt excuse or should I say so much for the truth! Innocent behavior just became an aggravating factor.

That brings us to another issue. How many times have you heard a judge say "your client is no stranger to the criminal justice system," or "your client is a threat to the community" or "your client has had numerous contacts with the police?" How many times have those statements been based solely on mere arrests? When you hear these words at sentencing, make sure the judge articulates on the record the basis for reaching such a conclusion. If your client's criminal background consist only of prior arrests and one conviction or prior arrests and old convictions, your vigilance may have preserved an issue for appeal or post-conviction relief. In *State v. Shuler,* 162 Ariz. 19, 780 P.2d 1067 (1989), the appellate court held that when a trial court "aggravates a sentence based on the mere report of an arrest, with no evidence of the underlying facts to demonstrate that a crime or some bad act was probably committed by the defendant, the trial court errs." 162 Ariz. At 1069.

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Solutions

In most cases, you will not want to wait until after sentencing to raise the issue of improper aggravation. In our scenario, without the prior drug arrest history, the client's background is nonexistent and probation would be warranted. In this situation, an attorney should consider the different options already available in Rule 26.8, Ariz. Rules of Criminal Procedure. One option is to file a motion to strike those portions of the criminal history that contain mere arrests. If the presentence writer mentions the arrests in the body of the report, then the attorney should ask that those references also be stricken. Finally, if it appears that the presentence writer gave substantial weight to prior arrests, you may want to ask for a new report and depending on the tone of the old one, you may even want to ask for a new presentence writer. All of these options are provided for in Rule 26.8.

Obviously, these solutions remind one of the old adage about slamming the barn door shut after all the cows are gone. Perhaps, a better approach would be to file a presentence motion before the report is done. This does not need to be done in every case, just those cases where you know or have a hunch that your client has a significant arrest history. The motion should ask the judge to order the probation department to refrain from including in their report any references to mere arrests. Inform the judge that mere arrests are improper factors to consider in sentencing and should not be brought to the court's attention. *State v. Romero*, 173 Ariz. 242, 841 P.2d 1050 (1992).

Most judges will probably agree with that assessment. If they question it, tell them the story of Fadel and Mohammed and how possession of yogurt could be an aggravating factor in Arizona. In other words, remind them that making assumptions based upon unreliable information is not the role of a judge and such practices will lead to a miscarriage of justice. ■

PREPARING JURY INSTRUCTIONS

By Lawrence S. Matthew
Deputy Public Defender

"What we have here is a failure to communicate."
-- Cool Hand Luke

More convictions are reversed due to erroneous jury instructions than for any other single reason.[1] This fact alone should cause trial counsel to allocate an adequate amount of pretrial preparation time to readying instructions that best communicate the law to laypersons. Moreover, since counsel is required to make a detailed record[2] if a requested instruction is refused, inadequate preparation will kill a potential appellate issue.[3]

Complete and well thought out jury instructions don't arise from right-before-the-trial brainstorming sessions. The best instructions are developed well in advance of trial. The best instructions not only communicate principles of law to the jury, they enable counsel to frame the issues during the investigatory phase of litigation.

Timing is Everything

When should you prepare your jury instructions? Always have them complete and filed ***before the trial begins***.[4] How far in advance of the trial should you start? *Very early*.

Preparing instructions in advance will sharpen your understanding of the issues and enable you to focus on the evidence you must elicit during trial. Remember, an instruction on an issue or theory may only be given if evidence reasonably supporting the issue or theory is presented during trial.[5] The best way to insure that you present the requisite evidence is to ***know in advance*** what instructions you want presented to the jury. Further, early assembling of the basic instructions will force you to review the elements of the charge(s), determine your best defense(s), and sharpen your questions for both interviews and examination of witnesses.

Finally, completing instructions in advance will help you in opening statements. It will enable you to highlight for the jury and the judge the facts you will present in support of the instructions you seek.

Early Preparation Folder

One method for early preparation of jury instructions is to create a jury instruction folder for the case file. In one column of a cover sheet, list those instructions which must be given. In a second column, list instructions that may become relevant and necessary. Leave room for additional instructions. Place hard copies of all your listed instructions in the file. When the date for filing the instructions approaches, prepare your formal pleading listing your requested instructions.

Formal Preparation Checklist

(I) Standard Instructions. Begin preparing your requested instructions by assembling the standard instructions that must be covered in every criminal case (e.g. Presumption of Innocence; Reasonable Doubt;[6] Credibility of Witnesses; etc.).

(ii) Non-Standard Instructions. Prepare instructions on non-standard issues that are relevant to your case (e.g. Affirmative Defenses; Lesser-Included Offenses; etc.). Exclude from your requested instructions any alternative defense you expect to raise, but only if you are reasonably certain the prosecutor will be surprised by its presentation at trial. You can submit the omitted instruction during the settlement conference.

(iii) Editing. Review the language of all instructions with an eye towards whether each is worded in such a way as to permit a lay person to comprehend the legal concept contained in the instruction. Arizona recognizes that "those who craft instructions must exert the effort to differentiate between the linguistic universe for lawyers . . . and the linguistic universe for lay persons. . . .'"[7] Thus, edit your requested instructions so that each is as short and concise as possible. Avoid technical terms whenever possible. Simple declarative sentences are best.

Many RAJI's have been ultimately rejected after years of litigation. They are not etched in stone. If you come up with a way to make any instruction simpler and more comprehensive to the jury, don't hesitate to submit a modified version.

The Revised Arizona Jury Instructions (RAJI's) are by no means perfect. Many RAJI's have been ultimately rejected after years of litigation[8] They are not etched in stone. If you come up with a way to make any instruction simpler and more comprehensive to the jury, don't hesitate to submit a modified version.

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(iv) "Shepardizing." Although there is no "Shepard's" for jury instructions, you should always review case law to determine if a case has come down approving, criticizing, or overruling a given instruction. If possible, counsel should also review the cumulative index to *for The Defense* under the "Jury Instructions" heading. Here counsel will find a list of several articles that either criticize certain instructions or offer guidance on a variety of jury instruction topics. Additionally, checking with an appellate section attorney may also be beneficial. Find out what instruction(s) are currently being challenged on appeal.

(v) Format. Pursuant to a local rule,[9] requested instructions shall be numbered and cite any authorities relied upon in support. The RAJI's may be requested by designating the number of the instruction, e.g. RAJI No._____. In these instances, there is no need to submit the full text of the RAJI.

Where Should You File?

It is a common practice for counsel to file the original and a copy of the requested instructions with the judge. This is a bad practice because judges occasionally misplace your instructions, i.e. they fail to file them in the court file. If you lose the case, there will be no hard copy in the record on appeal. *Always file your original requested instructions with the clerk's office.*

Hurdles to Clear

Instructions presented by either side must pass certain tests to be acceptable. First, no instruction may be a comment on the evidence.[10] Instructions must be reasonably supported by evidence presented during trial.[11] Instructions must be a proper statement of the law.[12] No instruction may mislead the jury as to the law.[13]

Defense counsel should be on the lookout for instructions that shift the burden of proof[14] as well as instructions that "telegraph" to the jury the identity of the party who offered the instruction.[15] Both sides must overcome these potential objections to requested instructions.

Verdict Forms

Don't short change yourself when it comes to preparing verdict forms. Although it seems obvious, always make sure you have the correct number of Not Guilty / Guilty forms ***for each count*** and, when applicable, ***for each defendant.***[16] Always determine whether the jury needs to make a special finding in connection with a verdict, e.g. Dangerous or Non-Dangerous; Premeditated Murder or Felony Murder.

If you have multiple counts of the same type of offense, ***always specify in the verdict form the count to which it relates.***[17] If you do not do this and the jury acquits on one but convicts on the other similar offense, there will be no way of knowing which count serves as the conviction.

Finally, if the class of the felony or misdemeanor is determined by the manner in which the offense was committed, make sure you have the jury make a finding as to the method of commission. For example, the method by which disorderly conduct is committed determines whether it is a felony or a misdemeanor. If a jury returns a verdict form that simply reads: "We find the defendant guilty of disorderly conduct," there may be a dispute as to whether the conviction is a felony or misdemeanor.[18]

Early effective preparation of jury instructions aids 1) your ability to best represent your client; 2) the judge's understanding of the case; and 3) the jury's ability to understand the complex issue of applying the law to the facts of the case.

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1. Bailey and Rothblatt, *Successful Techniques for Criminal Trials,* § 26:1 2d Ed. 1985).

2. Making a record at the settlement conference is beyond the scope of this article. For information on this issue, the author recommends the following: *Jury Instruction -- Getting the Jury to Vote Your Way*, Volume 4, Issue 3 of *for The Defense* (March 1994); *Making a Record for Jury Instructions* and *Making a Record: Settling Jury Instructions,* both from *for The Defense,* Volume 2, Issues 7 and 8, respectively (1992).

3. *See,* Rule 21.3 of the Arizona Rules of Criminal Procedure which provides:

> No party may assign as error on appeal the court's giving or failing to give any instruction or portion thereof or to the submission or failure to submit a form of verdict unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of his or her objection.

4. The actual deadline for filing instructions may vary from division to division. Rule 21.2 of the Rules of Criminal Procedure permits filing as late as "the close of evidence. . . ."

5. *State v. Reid,* 155 Ariz. 399, 747 P.2d 560 (1987); *State v. Walters,* 155 Ariz. 548, 748 P.2d 777 (App. 1987).

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6. Although a new Reasonable Doubt instruction was recently promulgated, problems still exist. See, Defining Reasonable Doubt: Is Winship Sinking?, Volume 6, Issue 8 of *for The Defense Newsletter*, (August 1996).

7. *State v. Noriega,* 221 Ariz. Adv. Rpt. 22 (Ct. App. 1996) *quoting, Jury Instructions, A Persistent Failure to Communicate,* 67 N.C. Law Review 77, 99 (1988).

8. For example, the so-called *Hunter* instruction was rejected after it was held that the instruction shifted the burden of proof. *State v. Hunter,* 142 Ariz. 88, 688 P.2d 980 (1984). More recently, a new reasonable doubt instruction was promulgated by the Arizona Supreme Court and the so-called *Wussler* instruction regarding lesser-included offenses (RAJI Standard Criminal #22) was also rejected. *See, respectively, State v. Portillo* 182 Ariz. 592, 898 P.2d 970 (1995), and *State v. Leblanc,* ___ Ariz. ___, 924 P.2d 441 (1996).

9. Rule 2.9(b) of the Local Rules of Maricopa County Superior Court.

10. Article 6, Section 27 of the Arizona Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

11. *See,* Endnote 5.

12. *See,* Endnote 10.

13. *Evans v. Pickett,* 102 Ariz. 393, 397, 430 P.2d 413, 417 (1967).

14. An accused is presumed innocent until proven guilty. *A.R.S. 13-115(A).* For arguments that RAJI Standard Criminal #13 (Non-Defense to Criminal Liability - Absence of Other Participant) and Standard Criminal # 14 (Entrapment) as well as Statutory Criminal #4.13 (Justification Defense and Acquittal) shift the burden, *See, Jury Instruction -- Getting the Jury to Vote Your Way* and *"Approved" Entrapment Instruction May Shift the Burden of Proof*, both in Volume 4, Issue 3 of *for The Defense* (March 1994).

15. Rule 21.3(b) of the Arizona Rules of Criminal Procedure provides: "The court shall not inform the jury which instructions, if any, are included at the request of a particular party."

16. *See,* Rule 23.2(a).

17. *See,* Rule 23.2(c).

18. For more about this issue, *see, Instructing the Jury on Disorderly Conduct*, Volume 5, Issue 12 of *for The Defense* (December 1995). ■

Rule 11 Changes

By Nora Greer
Deputy Public Defender

The Arizona Supreme Court has changed Rule 11 of the Rules of Criminal Procedure to conform to the statutes passed by the legislature in 1995. Rule 11 and A.R.S. §§ 13-4501-4519 now have parallel language. The new legislation changes the focus of Rule 11. The process now emphasizes restoration and continuing care. Presently, there are no appellate decisions interpreting the new statutes or rules. That litigation will be forthcoming due to the vague language of the new statute.

Confidentiality vs. Rule 11

One major problem with the new law starts with the required disclosure of possible confidential information in order to request a Rule 11 pre-screen. A.R.S.§ 13-4503(B) requires that "(w)ithin three working days after a motion is filed pursuant to this section, the parties shall provide all available medical and criminal history records to the court." Some judges in Superior Court have interpreted this section to mean that all your client's medical and psychiatric history must be attached to the prescreen motion and become a public record. How you reconcile this requirement and existing privileges, remains a mystery. My current advice is to acknowledge the problem in your motion for the pre-screen. Your motion should state that you have the information relating to medical and psychological history. This information will be given to the doctor performing the pre-screen once he has been appointed. However, this information will not be attached to the report due to the privileges existing in A.R.S. § 12-2235(doctor-patient), §13-4062(2),(4), §32-2085(psychologist-patient) and Sup. Ct. Rules, Rule 42, E.R. 1.6 (lawyer-client). If the judge insists upon following the rule, ask that the motion be placed under seal so confidentiality is not breached. A refusal to follow either suggestion is a ripe subject for a special action.

Easier said than done? The problem with this section is the faulty drafting of the statute and rule. What the drafters wanted to do (I think) was to ensure the doctors performing the examinations had all relevant information. Doctors should not be doing pre-screens blind. Nevertheless, this information is confidential and should never become part of the public record under any circumstance. All attorneys need to make the proper response and keep on doing it until changes are made.

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Rule 11 & Misdemeanors

The second notable change concerns misdemeanors. A.R.S. §13-4504 allows the court to dismiss misdemeanor charges if a person has previously been adjudicated incompetent. This provision can help you get cases dismissed quickly in justice court. The Phoenix City Prosecutors office has used this statute on a regular basis. The only catch is that the judge is allowed to begin civil commitment or guardianship proceedings on his own initiative. see A.R.S § 13-4504(B).

Restoration Time Limits

If a doctor finds that a defendant is incompetent to stand trial, the court will order an attempt at restoration, unless there is clear and convincing evidence the defendant will not be restored to competency within fifteen months. A.R.S. §13-4510 This presumption is new in Arizona but several other states already have it. The bottom line for our clients is that they can now expect to spend time in the Arizona State Hospital if they are found incompetent. It is much more difficult for the doctor to find them incompetent and non-restorable up front. The good part of this is that the client can be treated at the Arizona State Hospital (ASH) instead of the Maricopa County Jail psychiatric wards. The bad part is that the defendant can be held at ASH for up to fifteen months and an additional six months if making progress towards restoration. A.R.S. § 13-4510. The client can be subjected to involuntary treatment and medication. A.R.S. §13-4511 ASH must submit a progress report every 180 days. The defendant also cannot be treated for a longer period of time than he would have spent in the Department of Corrections.

The bottom line for our clients is that they can now expect to spend time in the Arizona State Hospital if they are found incompetent.

Clients On Release

In-custody clients may welcome the chance to go to the state hospital instead of spending time in jail. But out-of-custody clients still face the possibility of being locked up for treatment. If your client has never had an attempt at restoration, the statute encourages one to be done. The restoration attempt can be done on a out-patient basis. See A.R.S. §13-4512(A). This means more work for the lawyer. To obtain out-patient treatment, the doctors must recommend it. The statute requires that the "court shall select the least restrictive treatment alternative" after considering whether confinement is needed and the threat to public safety presented by the defendant. A.R.S. § 13-4512(A) The Rule 11 commissioners have a form that shows what type of information needs to be included in a treatment plan. Your client's doctor probably has a treatment plan of some kind. That plan needs to be given to the court along with some provision for improving the client's competency through both medication and education. The Forensics Unit of the Superior Court also must approve of the plan. The client has to be stabilized on medication. He needs to be taking medication that can get him to his highest level of functioning. Once he is at that level he can then undergo some kind of education about what happens in court.

The education aspect of competency restoration raises controversial questions. Are clients really learning about court or are they memorizing what someone has told them? Will they truly understand how to participate in their defense when they are finished with the class? The premise behind the new statutes and rules is that defendants can learn enough about the court system through classes to be restored to competency. Right now clients cannot receive competency education on an out-patient basis. ComCare has no contract to provide this kind of service to the county. Whether this situation violates our clients' rights under *Arnold v. Sarn* or the Americans With Disabilities Act (ADA) remains to be seen. There has been previous unsuccessful litigation about the impact of the ADA on in-custody restoration. Attorneys need to reconsider this approach. Our out-of-custody clients need out-patient restoration.

Disposition

The final major change concerns the disposition of cases for clients who are incompetent, not restorable and not committable to ASH. These clients are usually mentally retarded or have some kind of organic brain problem (i.e. brain damage, dementia, Alzheimer's disease etc.). The people with these kinds of problems were one of the main reasons for changing the law. There was a belief that the court was releasing dangerous mentally retarded defendants without any restrictions. The new statute now allows the court to order a guardianship for the person after he is found incompetent and non-restorable. A.R.S. § 13-4518. The guardian appointed under this section can take "whatever steps necessary to ensure that the person participates in treatment or training programs ordered by the court or found necessary by the fiduciary, including admission to a secure facility..." A.R.S. § 13-4518(C). The court also has continuing jurisdiction over the guardian and ward. A.R.S. § 13-4518(D). Finally, the court can order that the Psychiatric Security Review Board to monitor defendants who have been found incompetent and non-restorable. A.R.S. § 13-4519. If the defendant is viewed as a threat to public safety, the board can make

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recommendations regarding their conditional release or discharge. Id. These provisions have not been used in Maricopa County since the statute went into effect approximately 18 months ago. The long-term effect is totally unknown.

Although most attorneys only do one or two Rule 11 cases a year, the rule changes will impact your practice and the lives of your clients. You may find yourself filing motions and special actions in order to represent your client effectively. Be Prepared. ■

DID YOU REGISTER FOR THE 1997 DUI "GOING TO TRIAL" SEMINAR?
IT'S BEING HELD ON FRIDAY, FEBRUARY 28, 1997 AT THE PHOENIX CIVIC PLAZA, NORTH HALL, FLAGSTAFF ROOMS. DON'T WAIT! SIGN UP NOW!

Joe Shaw Award Presented to Bud Duncan

By Jim Haas
Senior Deputy Public Defender

At the office holiday party on December 12, the 1996 Joe Shaw Award was presented to Bud Duncan. The Shaw Award was created in 1995, the 30th anniversary of the office and the year of Joe's retirement, to recognize Joe's integrity and years of dedication to the office and the cause of indigent defense. It was presented to Joe himself in 1995, and will be awarded each year to the attorney who best exemplifies Joe's considerable qualities. A plaque was presented to Bud by Joe Shaw, following comments by Dean Trebesch. In addition, Bud's name will be added to a plaque honoring the Shaw Award recipients, which will be permanently displayed in the Training Facility.

Bud Duncan has been a trial attorney in Group B since June 1987. Prior to joining the office, Bud was an attorney with Community Legal Services. Bud's entire legal career has thus been devoted to the representation of indigent and disadvantaged individuals. Bud is well known as a compassionate and fierce advocate for the rights of his clients.

Bud was selected for the Shaw Award by a committee made up of nine members of the office. Each trial group, juvenile site, division, and the support staff was represented. The committee did *not* include a representative of administration, as the Shaw Award is intended to be recognition from the recipient's peers, the folks "in the trenches." The members of the committee were recruited by their supervisors, who sought out individuals who would be thoughtful, impartial and open-minded in considering potential recipients. They all volunteered to serve for one year.

The members of the 1996 Shaw Award committee were **Frances Arevalo** of Records; **Susan Corey** of Trial Group A; **Gerry Kaplan**, Juvenile-Durango; **Jeanette Komadina**, Juvenile-SEF; **Chuck Krull**, Appeals; **Colleen McNally**, Trial Group B; **Emmet Ronan**, Trial Group C; **Joe Stazzone**, Trial Group D; and **Mary Ann Twarog**, Mental Health. This committee met several times during the course of the year. One of their first decisions was that none of them would be eligible for the award.

In August, the committee solicited nominations for the award from all employees of the office. Twenty-two nominations were received, nominating thirteen attorneys for the award. Bud Duncan got *six* of the twenty-two nominations. The committee met twice to thoroughly consider all of the nominations before reaching their final decision.

Congratulations to Bud Duncan for earning the respect and admiration of his colleagues. The award is well deserved. And many thanks to the members of the committee, who performed their duties thoughtfully and fairly, and made a great choice. The Joe Shaw Award is off to a great start, and will hopefully become an award that is respected and coveted by the members of this office and the rest of the legal community.

And, oh, by the way, the 1997 Joe Shaw Award Committee must now be formed. If you are interested in serving, please advise your supervisor. ■

PROFILES-WHO'S WHO IN THE PUBLIC DEFENDER'S OFFICE

By Ellen Kirschbaum
Training Administrator

Often, she's one of the first persons that our clients meet from the office and it's always with an unexpected smile and offer to assist. Sounds like typical business etiquette, but for our clients, this is an unusual experience. Who is this special person? It's Frances Arevalo. You can't help but notice Francis as she always smiles and waves as you walk past Initial Services. Frances has been an employee of the Public Defender's Office since 1985. She started in the Records area and for the last seven years has been the main receptionist for the Office.

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Frances is a native Phoenician and has been married to Gilbert Arevalo for 23 years. They have four children, two boys and two girls. For Frances, working in the Public Defender's Office has even become a family affair. Her daughter, Adrienne works in Records and her son, Gilbert, was previously employed as an office aide but left to join the Air Guard.

Frances has met countless faces, answered thousands and thousands of phone calls and experienced a number of strange and even "scary" situations while on the job. She's even been called "the phone police." Most recently, she encountered an individual who was sure that he was in the train depot and wanted to know where to go to watch the "Santa Fe" coming through. He was emphatic that he couldn't miss the train because a deceased football hero was entombed on that train. Frances directed him to the right location to watch the train! Then there was the man that slapped himself every time Frances asked him a question. The stories go on and on and so does the enthusiasm for her work. I asked Frances what keeps her going and she said it's her motto, "treat the clients with courtesy and they will treat you the same." Good advice.

When I asked Frances about her personal life, she told me she was "boring." Wrong! Frances has a contagious laugh and she possesses a strong spark of excitement. You can ignite that spark when the subject of basketball and grandchildren are touched. She has four grandchildren and is looking forward to retirement when she can spend more time with them. But that's a ways off and for now, she likes greeting the clients. We're glad because we'd miss her smiling face. ■

ARIZONA ADVANCE REPORTS

A Summary of criminal defense issues in Volumes 233-234

By Terry Adams
Deputy Public Defender

State v. Lacy, 233 Ariz. Adv.. Rep. 3

This was a case involving a double homicide committed in 1982. Defendant was in custody on unrelated charges in 1983 and made statements regarding the murders. Defendant and co-defendant were charged eight years later. Held: due process not violated by preindictment delay. Defendant must show intentional delay by state for strategic or harassment purposes. Confession was voluntary even though the police officer said he would help if defendant talked. Because there was a month delay between statements and defendant initiated the second conversation, this showed that the defendant did not rely on police promise in making the statements. Dismissal of underlying felony because the statute of limitations had run did not negate felony murder conviction. This was true because there was no judicial finding on merits of that charge. A non-trigger man can be given the death penalty only if he was a major participant and showed reckless indifference to human life. Finding of helplessness of victim and senselessness of crime without more will not support finding of heinous and depraved aggravating factor. Death penalty set aside.

State v. Stricklin, 233 Ariz. Adv.. Rep. 14 (12/18/96)

Police officer observed a black male by a gas station "peering around the corner...as if he were trying to hide possibly to avoid detection from oncoming traffic..." Police officer observed this several times then contacted the defendant. Defendant was subsequently searched and crack cocaine was found in his possession. Insufficient articulation of facts for *Terry*-type stop. Because the initial stop was bad, the subsequent pat down also was bad. Even if the stop was constitutional, there was no evidence to show that the police officer believed he was at risk which would warrant a pat down.

State v. Tinajero, 223 Ariz. Adv.. Reports 36 (1/9/97)

The defendant was charged with manslaughter, two counts aggravated assault and three counts of leaving the scene of an accident involving injury or death. This was an accident where the driver of the other car was killed and two passengers injured. Defendant's blood alcohol level was .22. The police officers took a statement from defendant. They did not advise the defendant that someone had died in the accident. A.R.S. 13-3988 requires a judge to consider whether defendant knew the nature of the charges at time of his confession. However, the statement was not involuntary because he was not so informed. Leaving the scene of an accident can result in only one conviction no matter how many occupants are in the vehicle. Consecutive sentences for manslaughter and leaving scene is appropriate because they are separate offenses. Lack of remorse is not an aggravating factor when a defendant maintains his innocence.

State v. Mott, 234 Ariz. Adv.. Reports 7 (1/16/97)

Defendant left her child with her boyfriend. When she returned the child was injured. The boyfriend advised her that the child had fallen and hit her head. A friend came by and offered to take the child to the hospital but defendant refused. The following morning the defendant told a friend that the child would not wake up. The friend called 911. A physician found a large hemorrhage in the brain which resulted in death several days later. The injury was determined to be non-accidental. The child also had numerous other injuries including bruises, abrasions, and cigarette burns. The defendant told police that her boyfriend had been abusing the child and she was trying to leave him to protect her. She did not take her to the hospital because she did not

(cont. on pg. 9)☞

want anyone to see the other injuries or get her boyfriend in trouble. The defendant was charged with two counts of child abuse and first degree murder. The defendant noticed a defense of lack of capacity to act, based on the Battered Woman Syndrome. State moved to preclude this defense claiming it was only available in self-defense cases where a victim has battered the defendant. The trial court held the defense was an attempt to establish a diminished capacity defense and not admissible. On appeal, the defendant argued she was offering expert testimony to demonstrate that she was not capable of forming the requisite mental state of knowledge or intent. Held: Arizona does not recognize a diminished capacity defense, therefore, the defendant could not use psychiatric testimony to negate specific intent. The McNaughten test is still the sole standard for criminal responsibility. Due process does not require courts to admit evidence of mental abnormality to negate *mens rea.* Also, the admission of evidence that 1½ years earlier the defendant had struck the child and abandoned her was not a violation of 404(b) because it was admitted to show motive and therefore relevant under 403. Defendant waived requirement of limiting instruction by not requesting it. Also, it was not error for the trial court to inform the jury during *voir dire* that if convicted the defendant would not receive the death penalty.

State v. Richcreek, 234 Ariz. Adv.. Reports 22 (1/21/97)

The police were investigating a roll-over accident late at night in a secluded area. There was no driver present when they arrived. The defendant drove by, slowed almost to a stop and pulled over to the side of the road. He then quickly accelerated and left. Thinking that the defendant might know something about the accident, one officer followed him for about ½ mile and stopped him to so inquire. The defendant was not observed violating any laws nor suspected of committing criminal activity. The defendant acted somewhat strangely and nervous. When asked about the accident investigation, he said he stopped to see if anyone needed help. With all of this suspicious activity in mind, the officer checked the defendant's license and registration. The car was stolen. The defendant moved to suppress the report that the car was stolen. The trial court denied the motion, Court of Appeals affirms, Supreme Court reverses. The court held that random vehicle stops, when not based on reasonable suspicion of criminal activity, constitute an impermissible seizure under the 14th amendment. This is a good case for distinguishing automobile stops from other stops. ■

Bulletin Board

◆ *New Attorneys*

Due to the Board of Supervisor's authorized increase in attorney positions, we are pleased to welcome several new attorneys currently in training.

Lorraine Brown joins our office as an attorney assigned to Trial Group B. Ms. Brown has extensive experience in representing indigent clients. She obtained her J.D. degree from the State University of New York at Buffalo. She has practiced in New York City, N.Y., the District of Columbia and most recently, the Southern Arizona Legal Aid Society in Sacaton.

Barbara Fuqua, was recently admitted to the Bar and will be working in Trial Group A. Ms. Fuqua holds a B.S. in Business Administration from the University of Cincinnati, Ohio and a J.D. from Arizona State University College of Law. Until joining this office, Ms. Fuqua was a law clerk in the Law Offices of Tamara Brooks-Primera.

Michael Leal is a graduate of Arizona State University and the University of Arizona College of Law. Prior to coming to our office, he worked as a clerk in the Pima County Public Defender's Office. Mr. Leal will be practicing in Trial Group A.

Richard Luna is a graduate of Arizona State University for both his B.S.E. and J.D. His undergraduate degree is in Bioengineering. Mr. Luna is a former law clerk from the Law Office of Gabriel Valdez, Jr. He will be assigned to Trial Group B.

Mark Nermyr obtained his B.A. in Political Science from Arizona State University. He then continued on at the College of Law to obtain his law degree. Mr. Nermyr was admitted to the Arizona State Bar in October, 1996. He is assigned to Trial Group C.

Christina Porteous joins Trial Group D. Ms. Porteous is a graduate of the California Western School of Law. Her undergraduate degree, a B.S. in Business Administration, was obtained from Boston University. Ms. Porteous has clerked for the firm of Borowsky & Johnson.

John Rock is a former Public Defender from La Paz County, Arizona and participant in our DUI Extern program. Mr. Rock attended Arizona State University obtaining a B.A. in History and then a J.D. from the College of Law. Mr. Rock will be working in Trial Group A.

Corwin Townsend has been working as a law clerk in Trial Group A. He recently passed the Bar and will be practicing in Trial Group A. Mr. Townsend is a graduate of Arizona State University with a B.A. in Communications and a J.D.

◆ *Attorney Moves/Changes*

Effective February 18, **Phillip Vavalides** resigned from the office to relocate to North Carolina.

(cont. on pg.10)☞

Genii Rogers also resigned effective Friday, February 14.

◆ *New Support Staff*

Rodrick Carter has been hired as a law clerk in Trial Group A. Mr. Carter recently graduated from the Arizona State University College of Law. ■

Computer Corner

By Susie Tapia & Gene Parker
Information Technologies-Help Desk

Flip-Its:

February's Flip-Its cover the setup process for the **GroupWise Proxy** function. The Proxy function allows another person in our post office the ability to access your calendar, or your "In or Out" box by granting selective mailbox rights. If given the rights to do so, proxies can read and send items on your behalf or schedule appointments directly on your calendar. This is helpful in maintaining your daily calendar of events. *Contact the Help Desk at x6198 for your GroupWise Proxy Flip-Its.*

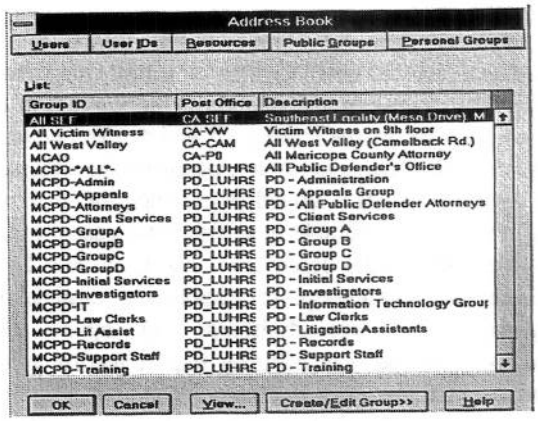
Short Cuts: § § § § §

Tired of using the **Insert, Character, Typographical Symbols** function to put the section sign in your documents? Use the quick key method: With your "Num lock" key selected, hold down your **ALT** key and then enter **21** on the number pad, then release the ALT key. The results will be "§."

GroupWise Public Groups:

There are clusters of individuals predefined in GroupWise to make E-mailing to many people at one time quicker. These Groups are found in the address book section titled as "Public Groups." The titles in the address book can be sized or removed so that descriptions or full group identification can be found. To remove the domain title, simply drag the title box off of the bar by pointing the mouse at the middle of the word "domain." Hold the left mouse button down and drag until the box is up and off the title box bar. Let go of the mouse. To widen the Group ID title box, point the mouse to the right edge of the title box until a double sided arrow appears. Hold the left mouse button and drag the right edge of box to the right. Widen the "Description Title" using the same manner.

When using Public Groups, always verify the members of your selected group, to ensure you are reaching the right people.



Training:

The response to our new singular topic training classes was overwhelming. We will continue to offer these specialized courses each month.

March courses: Intro to Windows & WordPerfect, Advanced WordPerfect, GroupWise, Tables, Templates, Merge Documents, Customizing your Toolbar, File Management and more.

Register for classes by calling x6198

Share Drive:

As a reminder, the share drive **S:** is to be used for passing or sharing documents among the Public Defender's employees. Anything you save to the s:\ drive can be viewed by other computer users. You are responsible for anything you put out on the S Drive. Please do not delete someone else's files and/or the letterhead and envelope files. These files are in s:\ and are to be stored here for all users to obtain. You may copy the letterhead or envelope documents to your h:\wpmain.

The structure of the S:\ drive should be a directory for your secretaries name with a subdirectory for your name. The I.T. department will be restructuring the share drive so that it is cleaner and easier to find the RAJI's's, expert files, newsletter indexes, your files and so forth. Look for the upcoming announcement. ■
Happy Computing!

Happy St. Patrick's Day!

JANUARY, 1997
Jury & Bench Trials

Group A

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
1/3-1/17	Brian Bond	Yarnell	Hicks	CR96-04065 4 cts. Aggravated Assault /F3 (Dangerous)	Not Guilty-- Guilty of 3 cts. lesser-included Misdemeanor Assault Hung on 1 ct. Misdemeanor Assault	Jury
1/14-1/23	Robert Ellig/ Norman Jones	Cole	Hernandez	CR96-03552 2 cts. Aggravated Assault/ F3 (Dangerous)	Not Guilty-- Guilty of lesser-included Disorderly Conduct (Dangerous)	Jury
1/21-1/23	Kristen Curry	Grounds	Lawritson	CR96-07036 Aggravated DUI/ F4	Not Guilty-- Guilty of lesser-included Driving on a Suspended License	Jury
1/22-1/29	Michael Hruby	Bolton	Garner	CR95-06214 3 cts. Aggravated Assault with weapon/ F3 Possession of Marijuana/ F6	Not Guilty of 3 cts. Aggravated Assault Guilty of Misdemeanor Possession of Marijuana	Jury
1/23-1/30	Tom Timmer	de Leon	Kramer	CR96-06961 Aggravated DUI/ F4	Not Guilty-- Guilty of lesser-included Driving on a Suspended License	Jury
1/21-1/23	Patricia Ramirez/Tom Neus	Sargeant	Schesnoz	CR96-05639 Aggravated Assault/F3,(Dangerous)	Guilty	Jury

Group B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
1/6-1/13	Peggy LeMoine/David Erb	McDougal l	Howe	CR95-05452 Child Molest/ F2 Sex.Condct w/Minor/ F2	Guilty	Jury
1/23-1/28	Peggy LeMoine	Hotham	Wildermuth	CR96-03929 Agg. Asslt./ F3	Hung	Jury
1/21-1/23	Mary Kay Grenier/Ronald Corbett	Topf	Bustamonte	CR96-08058 Robbery/ F4	Mistrial	Jury

1/8-1/14	Terry Bublik&Stacey O'Donnell/ Paulette Kasieta	Topf	Charnell	CR96-07477 Kidnapping/ F2(DAC) Agg. Robbery/ F3(DAC)	Not Guilty	Jury
1/13-1/23	Albert Duncan/John Taradash	Sticht	O'Connor	CR94-01862 Murder/ F2	Not Guilty-Murder 2 Guilty of Manslaughter	Jury
1/7-1/14	CharlesVogel/ David Erb	Hicks	Papalardo	CR96-06906(B) Sale crack cocaine/ F2	Guilty	Jury
1/28-1/31	Joel Brown	Arriola	Gorman	CR96-06874 Possession of Marijuana/F6	Guilty	Jury
1/27-1/29	Kristin Larish/Paulette Kasieta	Barker	Davidon	CR96-01965(B) POND/sale/ F2 PODP/ F6	Guilty-POND/sale Not Guilty-PODP	Jury
1/29-2/4	Terry Bublik-Stacey O'Donnell/ Ronald Corbett	Topf	Droban	CR96-04527 Agg. Asslt./ F6	Not Guilty	Jury

Group C

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
1/ 3-1/3	Leonard Whitfield & Tim Mackey	Araneta	McKay	CR96-92303 Poss. of Stolen Veh./ F4	Guilty	Bench
1/6-1/10	Anthony Bingham/Maria Breen	Scott	Harris	CR96-90724 Agg. Assault, F5 Resist Officer Arr./ F6	Not Guilty-Agg. Asslt. Guilty-Resist.	Jury
1/ 9-1/15	Clifford Levenson/George Beatty	Armstrong	Alt	CR96-93687 2 cts. Agg. Asslt./ F6	Guilty on both counts	Jury
1/16-1/28	Sylvina Cotto/George Beatty	Hendrix	Rueter	CR96-92058 Sale of ND/ F2	Hung/4-Guilty, 4 Not Guilty	Jury
1/13-1/13	Tim Mackey	Skousen S. Mesa	Freeman	CR96-01283MI Assault, M1	Guilty	Bench
1/17-1/17	Christine Israel	Armstrong	Sandler	CR96-91798 POM, M1	Guilty	Bench
1/21-1/27	Thomas Klobas/Maria Breen	Ishikawa	Smyer	CR96-91954 Theft, F3	Guilty	Jury

Group D

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
12/31/96-12/31/96	Marci Hoff	McVay (Northeast J.Ct.)	Cutler	MCR95-02563 Interfering w/Judicial Proceeding M1	Not Guilty	Bench
1/8-1/8	Hilary Berko& Nancy Hines	Gutierrez (South Phx. J.Ct.)	Combs	TR96-07958 2 cts. Driving on Susp. Lic. M1	1 ct. Dismissed 1 ct. Guilty	Bench
1/9-1/14	Dan Carrion/Mike Fusselman	Rogers	Bernstein	CR96-07515 Vulnerable Adult Abuse F4	Guilty	Jury
1/13-1/13	Margarita Silva	Ortiz (E#1J.Ct.)	Linn	TR96-06400 DUI/M1	Guilty	Bench
1/13-1/15	Carole Larsen& Gary Bevilacqua/ Richard Barwick	Kaufman	Ainley	CR95-10652 Agg. Asslt. Dang./F3	Guilty Lesser-Included Disorderly Conduct-Dangerous	Jury
1/16-1/21	Nancy Hines	Rogers	Fleenor	CR96-05224 PODD Misconduct Involving Weapons F4/F4	Guilty	Jury
1/16-1/28	Thomas Kibler/Richard Barwick	Arriola	Bayardi	CR95-07543 2 cts. Agg. Asslt. F3	Guilty	Jury
1/17-1/23	Jeremy Mussman &Jennifer Wilmott/Mike Fusselman	Bolton	Cutler	CR96-03902 First Degree Murder	Not Guilty Murder Guilty of Negligent Homicide	Jury
1/21-1/23	Robert Billar& Cynthia Leyh	D'Angelo	Myers	CR95-03902 2 cts. Agg. Asslt./F2	Guilty	Jury
1/22-1/24	Carole Larsen/Mike Fusselman	Skiff	Gialketsis	CR96-05098 Agg. Asslt./F3	Dismissed w/prejudice during trial Attorneys giving opening statements	Jury
1/22-1/29	Jeanne Steiner	Rogers	Reckart	CR96-02257 Trafficking in Stolen Property/F3	Not Guilty	Jury
1/27-1/28	Marie Dichoso-Beavers& Robert Jung	Johnson (E#1 J.Ct.)	Aubachon	TR96-16788 DUI/Speeding M1	Guilty	Jury
1/27-1/28	Jennifer Wilmott&Marie Dichoso-Beavers/Richard Barwick	D'Angelo	Myers	CR96-09161 Possession of Crack Cocaine/F4	Guilty	Jury
1/29-1/29	Jeanne Steiner	McBeth E#1	Coury	MCR96-03863 Misconduct Involving Weapons/M1	Dismissed w/o Prejudice	Bench

OFFICE OF THE LEGAL DEFENDER

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench /Jury Trial
1/14-1/17	L.Tate	Dunevant	M.Brnovich	CR96-01602 Agg. Asslt. C3F	Guilty	Jury
1/2-1/23	R. Miller K. Brandenberger	Gerst	L.Krabbe	CR95-08202 Murder 1 C1F	Not Guilty	Jury